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IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR

ORDER

Mahmud Sheikh Vs. Smt. Batul
S.B. CR. REVISION PETITION NO.418/2005

Against order dated 29.04.2005 passed by Chief
Judicial Magistrate, Churu in Criminal Misc. Case
No.21/2004 – Smt. Batul Vs. Mahmud Sheikh.

DATE OF ORDER :: 11th December, 2006.

PRESENT

HON'BLE MR.JUSTICE SATYA PRAKASH PATHAK

Mr. Sandeep Mehta for petitioner.
Mr. P.N. Mohnani, Public Prosecutor.

BY THE COURT:

Husband of respondent Batul has preferred the
present revision petition under Sec.397/401 Cr.P.C.
aggrieved by the order dated 29.04.2005 of Chief Judicial
Magistrate, Churu in Criminal Misc. Case No.21/2004 (Smt.
Batul Vs. Mahmud Sheikh), passed on an application
moved by petitioner under Sec.126 Cr.P.C. for setting aside
the ex-parte order of maintenance under Sec.125 Cr.P.C.

and allowing him to contest the application of respondent Batul moved under Sec.125 Cr.P.C.

Succinctly stated, on an application moved by respondent wife Batul under Sec.125 Cr.P.C. stating inter-alia that she was married with petitioner Mahmud Sheikh about 28 years back and they lived as husband and wife upto 1982, and during that period out of the wedlock they got three female issues but the husband in the month of April 1982 started keeping with him one lady of Agrawal caste by name Annapurna and thereafter contracted marriage with her. On her raising protest against this, she was manhandled and ill-treated and the husband leaving the city of Churu went to Ahmedabad, where the family persons of Annapurna were living, and from there later on he shifted to Goa. It was said that the husband never returned to take care of them and out of the three daughters two were married in due course of time by the elder brother of the husband and as the third daughter has become of marriageable age, in such circumstances she is in need of maintenance allowance as she herself is having no source of income, while the husband is earning

thousands of rupees a day. On her contracting the husband at Goa where he settled later on, he rebuked her and refused to pay her any maintenance allowance. By filing the application she prayed for Rs.2 lacs for the marriage of her unmarried daughter and maintenance allowance Rs.6,000/- per month. Since the husband did not respond even after service of summons, exparte proceedings were taken and ultimately the trial Court awarded a sum of Rs.2,000 per month to wife as maintenance from the date of application. Against that order dated 26.03.2004, an application under Sec.126 Cr.P.C. was filed by the husband requesting to set aside the exparte order inter-alia on the ground that he is known by the name of Mahendra Kumar Agrawal at the place where the notices were affixed and deemed to be served. He stated that he had adopted the Hindu religion 22 years ago and changed his name to Mahendra Kumar Agrawal. He even filed the application by the name of Mahendra Kumar. The trial Court, discussed the matter in detail and dealing the authorities cited on behalf petitioner ultimately rejected the application, hence this revision petition.

The contention of the learned counsel is that ex parte order passed by the learned trial Court requires to be quashed and set aside for the simple reason that service effected is not legal, valid and proper. It has also been submitted that Sec.61, 62 & 68 of the Cr.P.C. specifically provide the procedure for effecting service in the matters pending before a criminal Court. It has also been submitted that in the proceedings initiated against petitioner by respondent for maintenance, ex-parte proceedings were drawn and impugned order was passed on 29.04.2005, therefore, the order requires to be quashed and set aside. In support of his submissions, learned counsel has placed reliance on a decision reported in 1988(2) RLW 671 (Abdul Haneef Vs. Anis Fatma).

On the other hand, learned counsel appearing on behalf of respondent has argued that service was proper as there is specific finding in this regard by the learned trial Court, therefore, the revision petition requires to be rejected. It has also been submitted that in case it is considered in the facts and circumstances of the case that service on the petitioner was not effected according to the

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provisions of the Cr.P.C. then the interim order of maintenance granted by the trial Court vide its order dated 26.03.2004 be ordered to be given from the date of passing of the order as has been held in the case cited by the learned counsel for the petitioner.

I have considered the submissions made before me and carefully perused the impugned order and the material available on record.

The point, which requires consideration in this case is as to whether service effected on the petitioner by registered post is not legal and valid, and therefore, the order impugned passed by the learned trial Court requires to be set aside?

In the case of Abdul Hanif, this Court after considering the provisions of Cr.P.C., particularly Sec. 61 to 68, has observed in Para 4 and operative part of the judgment as under:

"This case presents unusual features that, though it appears from the order sheets that notices have been ordered to be

issued from time to time but there are neither the notices on record nor there are marginal notes shown by his office that notices have been issued on particular dates in the name of the petitioner. What is available on record is talbana, dated 7.2.87 on the basis of which a notice for 25.4.87 was issued under the signatures of the learned counsel dated 4.3.87. This is in form prescribed for issuing summons in a civil case and it is not known whether it was sent through the process server or was sent through the concerned police station. Then there is a letter from the Senior Superintendent of Post Office that the letter under reference has been delivered. There is one more talbana form submitted on 16.1.88 for 13.3.88 but again it is not indicated how the same was sought to be served. Under the Code of Criminal Procedure the legislation has enacted the whole Chapter VI regarding issuance of process to compel the appearance of party in criminal cases and further mode is prescribed that it should be served by a police official. It is only in respect of summons on the corporation that the summons can be served by post as contemplated by S.63 Cr.P.C. else whenever the court requires a proof of service mode is prescribed in S.68. Besides the above service of summons by post is permissible on witnesses also. A reading of Ss. 62 to 69 Cr.P.C. makes it absolutely clear that service of summons has to be effected through a police officer and cannot be considered sufficient even if a letter is obtained from the police station.

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I would accordingly direct that the petitioner shall pay interim

maintenance till the disposal of the petition under Sec.125 Cr.P.C. at the rate of Rs.400/- p.m. Rs.200/- for non-petitioner and Rs.200/- for her daughter. I had passed earlier an interim order to deposit Rs.2500/- in the trial Court. If the said amount is deposited, then out of the said amount Rs.500/- shall be paid as cost to the non petitioner applicant out of the money deposited and the petitioner shall go on continuing to pay the maintenance at the aforesaid rate by the 15th of each of subsequent month i.e. after receiving Rs.2500/- as mentioned above. First due will be on 15th of October, 1988. The learned Magistrate shall call the non-petitioner in person and direct her to open a Bank Account if possible and petitioner can be directed to directly deposit the monthly instalments in the Bank in her account. For the deposit amount also the learned Magistrate shall ensure that money reaches the hands of the non-petitioner herself."

In the above case, the provisions of Secs.125 and 126 of the Cr.P.C. were taken into consideration which were in relation to maintenance application. The Court has clearly held that service effected by registered post is not a sufficient service. In the above case, even the letter of Postmaster in relation to the service having been effected was not considered sufficient in view of Sec.62 of the Cr.P.C.

In the present case, it is not in dispute that the service is effected through registered post though there is no acknowledgment from the receiver and the service is thus being disputed by him. Be that as it may, in view of above authoritative pronouncement and taking into consideration Sec.61, 62 and also Sec.68 of the Cr.P.C., I am of the opinion that present matter is squarely covered by the said decision. Therefore, the impugned order under challenge requires to be set aside. Since the learned counsel for the petitioner has not disputed the legal aspect of the matter that the Court can while setting aside the impugned order can pass appropriate orders regarding interim maintenance, therefore, while accepting the revision petition and setting aside the order, it shall be appropriate and proper to direct the petitioner to pay interim maintenance as granted by the trial Court vide its order dated 26.03.2004 at the rate of Rs.2,000/- per month from the date of order.

Accordingly, revision petition succeeds, the impugned order dated 29.04.2005 is set aside and it is hereby directed that petitioner shall pay interim

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maintenance Rs.2,000/- per month till disposal of the petition under Sec.125 Cr.P.C. afresh by the trial Court from the date of the order of trial Court i.e. 26.03.2004. The parties present through their learned counsel are hereby directed to appear before the trial Court on 11th January 2007. The learned trial Court shall afford an opportunity of hearing to both sides and thereafter shall proceed in the matter in accordance with law.

(SATYA PRAKASH PATHAK)J.

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